

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| TW Telecom Inc. Petition for Declaratory |) | WC Docket No. 11-119 |
| Ruling Regarding Direct IP-to-IP |) | |
| Interconnection, Pursuant to Section 251(c)(2) |) | |
| of the Communications Act |) | |

**COMMENTS OF
THE NEW JERSEY DIVISION OF RATE COUNSEL**

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SUMMARY

The New Jersey Division of Rate Counsel (“Rate Counsel”) recommends that the Federal Communications Commission (“FCC” or “Commission”) approve the petition filed by tw telecom inc. (“TWTC”). Consumers benefit from competitive choice, and the approval of TWTC’s petition would further the goal of local competition and efficient network interconnection. Furthermore, Rate Counsel urges the Commission, as a separate but related matter, to determine unambiguously that fixed, interconnected Voice over Internet Protocol (“VoIP”) is a telecommunications service.

Rate Counsel supports TWTC’s recommendation that the FCC provide clarification soon. Regulatory uncertainty complicates new entrants’ ability to negotiate interconnection agreements and therefore could inhibit private investment and deprive consumers of the competitive choice that would otherwise exist.

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**COMMENTS OF
THE NEW JERSEY DIVISION OF RATE COUNSEL**

I. INTRODUCTION

The New Jersey Division of Rate Counsel (“Rate Counsel”)¹ hereby submits initial comments to the Federal Communications Commission (“FCC” or “Commission”) regarding the petition filed on June 30, 2011, by tw telecom inc. (“TWTC”) for a declaratory ruling that it has the right under section 251(c)(2) of the Communications Act, as amended, for Internet protocol (“IP”)-to-IP interconnection with incumbent local exchange carriers (“ILEC”) for certain IP-based services (“Petition”).²

¹ / Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Rate Counsel, formerly known as the New Jersey Ratepayer Advocate, is in, but not of, the Department of Treasury. *N.J.S.A. §§ 52:27EE-46 et seq.*

² / DA 11-1198, “Pleading Cycle Established,” WC Docket No. 11-119, “Comment Sought on TW Telecom Inc. Petition for Declaratory Ruling Regarding Direct IP-to-IP Interconnection, Pursuant to Section 251(c)(2) of the Communications Act,” July 15, 2011. Reply comments are due August 30, 2011.

For the reasons discussed in these initial comments, Rate Counsel supports TWTC's ability to obtain direct IP-to-IP interconnection with ILECs so that TWTC's VoIP services and its "IP-in-the-middle voice services" can be efficiently transmitted and routed. Rate Counsel also supports TWTC's request that the FCC clarify that TWTC's facilities-based VoIP services are telecommunications services as well as telephone exchange services and/or exchange access.

II. TWTC PETITION

A. Overview of TWTC Petition

TWTC's two-part petition seeks:

- FCC clarification "that TWTC's facilities-based VoIP services are telecommunications services as well as telephone exchange services and/or exchange access, and accordingly TWTC has the right under Section 251(c)(2) of the Act to establish direct IP-to-IP interconnection with incumbent LECs for the transmission and routing of TWTC's facilities-based VoIP services."³
- FCC clarification "that TWTC has the right under Section 251(c)(2) of the Act to establish direct IP-to-IP interconnection with incumbent LECs for the transmission and routing of IP-in-the-middle voice services."⁴

As TWTC explains:

Like traditional, TDM-based telephone service, the core functionality offered by TWTC's facilities-based VoIP services is the ability to make local and long distance (domestic and international) calls to, and receive such calls from, any party that the end user chooses. That is, TWTC's facilities-based VoIP services

³ / Petition for Declaratory Ruling of tw telecom inc., June 30, 2011 ("Petition"), at 2.

⁴ / *Id.*

consist of the packetized transmission of voice signals of the end user's choosing without change in the form or content of those voice signals.⁵

Rate Counsel concurs fully with TWTC that the ILECs' interconnection obligations are "central to the competition framework established by the 1996 Act."⁶ Regulatory clarity is essential so that as consumers migrate away from "traditional" telecommunications services to those that rely on newer forms of technology, these essential interconnection obligations are not eroded. ILECs have been able to construct and maintain a public switched telephone network as a direct result of their historic monopoly and their historic access to a source of ratepayer-guaranteed revenues. Consumers have a unique and compelling interest in ensuring that the *public* switched telephone network – which they have helped to fund – is configured and operated in a manner that encourages efficient and seamless interconnection, regardless of providers' choice of technology.

B. TWTC has amply demonstrated that its facilities-based VoIP service offerings meet the Act's definition of a telecommunications service.

Rate Counsel concurs with TWTC that its facilities-based VoIP service offerings meet the definitions of a telecommunications service as well as of a telephone exchange service and exchange access,⁷ as established in the Telecommunications Act of 1996 and codified in Section 153 of Title 47 of the U.S. Code:⁸

⁵ / *Id.*, Attachment A, Declaration of Michael E. McNamara on behalf of tw telecom inc. ("McNamara Declaration"), at para. 5. *See also, id.*, at para. 6, which states: "But while TWTC's facilities-based VoIP services are more efficient, scalable, and flexible than traditional, TDM-based voice service, the core functionality of these facilities-based VoIP services-the ability to make and receive telephone calls-is the same as that of TDM-based voice service."

⁶ / Petition, at 2.

⁷ / *Id.*, at 3-4, citing 47 U.S.C. § 153(46), (43), (47) and (16).

⁸ / Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as "the 1996 Act," or "the Act," and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

(43) Telecommunications

The term “telecommunications” means the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.

(46) Telecommunications service

The term “telecommunications service” means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

(47) Telephone exchange service

The term “telephone exchange service” means

(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or

(B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

(16) Exchange access

The term “exchange access” means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.⁹

Therefore, TWTC has the right to establish IP-to-IP interconnection with ILECs’ network in order to exchange facilities-based VoIP traffic.¹⁰

C. The FCC should unambiguously determine that TWTC’s service is a telecommunications service.

Rate Counsel concurs with TWTC that its service is a telecommunications service. Indeed, in addition to urging the FCC to approve TWTC’s Petition, Rate Counsel also urges the Commission to resolve its long-standing deliberations about VoIP regulation. The FCC has been actively considering how to treat VoIP services for more than seven years¹¹ and has yet to come

⁹ / 47 U.S.C. § 153 (16), (43), (46), and (47).

¹⁰ / Petition, at 4.

¹¹ / The *Pulver*, *Vonage* and *IP-in-the-Middle* cases, *infra* fn. 12-14, were decided in 2004, and the FCC initiated its pending *IP-Enabled Services* rulemaking, *infra* fn. 15, in that same year.

up with a definitive decision on how it should be classified (and what the effects of a particular classification should be).

The forms of VoIP can be loosely categorized as “interconnected” – able to complete calls to end users anywhere on the public switched telecommunications network, regardless of the technology they use for telephone service – or “non-interconnected” – able to reach only persons connected via some form of broadband Internet access service on their computer, and “fixed” vs. “nomadic.” The only form of VoIP that the FCC has affirmatively classified as an “information service” is non-interconnected, nomadic VoIP, such as the service offered by Pulver.com.¹² Subsequently, in the Vonage case, the FCC preempted states from regulating an interconnected, nomadic VoIP service (in which the VoIP service was sold independent of the broadband facility to the user’s premises), on the grounds that it is difficult to know whether the call is intra-or interstate – as determined by its two end-points – when the customer’s location is hard to identify.¹³ Finally, the FCC has classified calls transmitted using the Internet protocol only “in the middle” as telecommunications services.¹⁴ The FCC has yet to make a definitive classification or pin down all aspects of the regulatory treatment of “interconnected, fixed VoIP” services, such as the one offered by TWTC.¹⁵

^{12/} *In re Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, 19 FCC Rcd 3307 (2004) (“Pulver”). In Pulver’s “Free World Dialup” service (“PWD”), customers (“members”) could communicate only with other members and not with points on the PSTN. “Specifically, members must have an existing broadband Internet access service as Pulver does not offer any transmission service or transmission capability. In addition, members must acquire and appropriately configure Session Initiation Protocol (SIP) phones or download software that enables their personal computers to function as ‘soft phones.’” *Id.* at 3309 (para. 5).

^{13/} *In re Vonage Holdings Corp.*, op. cit. fn. 3. In 2003, Vonage was offering interconnected VoIP service to customers in Minnesota; since Vonage did not own or provide any broadband Internet access to the customer, the location of the customer’s originating service was not necessarily “fixed.”

^{14/} *In re Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, 19 FCC Rcd 7457 (2004) (“IP-in-the-Middle”). AT&T wanted the FCC to classify its “IP-in-the-Middle” service as an information service, but the FCC determined that it was a telecommunications service. As described by the FCC, “the service at issue in AT&T’s petition consists of an interexchange call that is initiated in the same manner as traditional interexchange calls -- by an end user who dials 1 + the called number from a regular telephone. When the call reaches AT&T’s network, AT&T converts it from its existing format into an IP format and transports it over AT&T’s Internet backbone. AT&T then converts the call back from the IP format and delivers it to the called party through local exchange carrier (LEC) local business lines.”

^{15/} *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004).

However, since opening its VoIP classification proceeding in 2004, the FCC has made it clear that VoIP providers, and especially those that provide VoIP over their own physical facilities, provide a service that shares many functional similarities with traditional wireline telecommunications service. As such, the FCC currently imposes numerous obligations of providers of interconnected VoIP services that parallel obligations imposed on providers that use older technologies to provide telecommunications services. Among these obligations are:

- Contribution to the federal universal service fund;¹⁶
- E-911 requirements (interfacing with public safety access points to identify customer location);¹⁷
- Protection of customer privacy, pursuant to section 222 of the Act;¹⁸
- Porting telephone numbers and contributing to expenses associated with administration of numbering database;¹⁹
- Accessibility mandates under Section 225 (requiring telecommunications service providers and equipment manufacturers to make their services and equipment accessible to individuals with disabilities, unless not readily achievable);²⁰
- Notice to customers prior to discontinuance of service;²¹ and
- Reporting information on VoIP business (FCC Form 477).²²

^{16/} *Universal Service Contribution Methodology*, 21 FCC Rcd 7518, 7538-43 (2006), *aff'd in relevant part, Vonage Holdings Corp., v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007).

^{17/} *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, 10257-58 (2005).

^{18/} *In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, 22 FCC Rcd 6927 (2007).

^{19/} *In re Telephone Number Requirements for IP-Enabled Services Providers*, 22 FCC Rcd 19531 (2007).

^{20/} *In re IP-Enabled Services; Implementation of Sections 255 and 251(a)(2) of The Communications Act of 1934, as Enacted by The Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, 22 FCC Rcd 11275 (2007)

^{21/} *In the Matter of IP-Enabled Services*, 24 FCC Rcd 6039 (2009).

^{22/} *Local Telephone Competition Report*, July 2009, *op. cit.* fn 20, at 1 ("Effective with the filing of data as of December 31, 2008, Form 477 is a Web-based electronic filing system, and the reporting of information about voice

With respect to its decision to impose these types of obligations on interconnected VoIP providers, the FCC has observed:

Title II and the Commission's rules subject all common carriers to a variety of non-economic regulations designed to further important public policy goals and protect consumers, and the Commission has stated previously that it 'will not hesitate to adopt any non-economic regulatory obligations that are necessary to ensure consumer protection and network security and reliability in this dynamically changing broadband era.' Included among these are the obligations we impose today on providers of interconnected VoIP service, which serve as important consumer protection measures.²³

Most recently, the FCC has issued a Notice of Proposed Rulemaking proposing rules to require interconnected VoIP and broadband Internet service providers to report significant outages to the FCC.²⁴

service subscribers is mandatory for providers of interconnected Voice over Internet Protocol (VoIP) service as well as for local exchange carriers and facilities-based providers of mobile telephony service.”)

²³/ *IP-Enabled Services*, 24 FCC Rcd 6039, 6040-41, para. 3 (2009).

²⁴ / *In the Matter of The Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers*, PS Docket No. 11-82, *Notice of Proposed Rulemaking*, rel. May 13, 2011 (“Notice”). The Notice provides: “47 C.F.R. § 9.3 defines an interconnected Voice over Internet Protocol (VoIP) service as a service that: (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-compatible customer premises equipment; and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.” *Id.*, at footnote 2.

Consumers' increasing reliance on VoIP-based service to connect to the public switched telephone network ("PSTN") underscores the importance of clarifying that VoIP is a telecommunication service. As of June 2010, 28% of the nation's households connected to the PSTN with VoIP-based service,²⁵ and, based on historic trends,²⁶ it is reasonable to assume that the nation's reliance on VoIP technology has further increased during the past fourteen months.

Regulatory clarity that fixed VoIP is a telecommunications service is long overdue. Rate Counsel urges the Commission to make such a finding.

D. The FCC should act on TWTC's Petition without delay.

Rate Counsel agrees with TWTC that the FCC should clarify "as soon as possible" that TWTC "has the right under Section 251(c)(2) of the Act to establish IP-to-IP interconnection with an incumbent LEC network for the purpose of exchanging facilities-based VoIP traffic."²⁷ Prolonged regulatory uncertainty constrains new entrants' ability to negotiate interconnection agreements with ILECs, and, therefore, may inhibit private investment. ILECs' overwhelming economic incentive is to stall or to deny interconnection agreements, and, therefore, timely regulatory intervention is essential to remedy the vast negotiating disparity that exists between incumbents and new entrants.

TWTC has demonstrated that the lack of direct IP-to-IP interconnection between TWTC and another voice service could degrade the quality of the service.²⁸ Regulatory intervention is essential so that consumers are not unnecessarily denied the benefit of the highest quality service

²⁵ / *Id.*, at para. 2

²⁶ / *Id.*, at para. 25.

²⁷ / Petition, at 4-5. *See also, id.*, at 6-8.

²⁸ / McNamara Declaration, at para. 9.

technically possible. TWTC has also demonstrated that direct IP-to-IP interconnection arrangements are technically feasible.²⁹

The FCC should promote efficient traffic interconnection. If ILECs are permitted to require CLECs to convert voice traffic to the TDM format so that they can hand off traffic to ILECs,³⁰ ILECs will be able to memorialize network inefficiencies, and, thereby deprive consumers of the benefits of new technologies.

III. CONCLUSION

Rate Counsel recommends that the Commission approve TWTC's Petition in a timely manner for the reasons discussed in these comments.

Respectfully submitted,

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²⁹ / *Id.*, at para. 10.

³⁰ / Petition, at 6-7.